83-78

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. -

GEORGE M. Verrussio, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Does jeopardy attach to criminal charges dismissed or not filed by the Government, pursuant to a plea agreement, when an individual is convicted and sentenced on other charges as a result of that plea agreement?

II.

A.

Is the Petitioner's right to be free of double jeopardy and right to due process of law violated when the Government, without prior court sanction, reinstates criminal charges previously dismissed pursuant to a plea agreement, when the Petitioner was convicted and sentenced on other charges as part of the plea agreement, and when, after completion of the Petitioner's sentence, the Government learns that the Petitioner may have violated a portion of the plea agreement by giving a false statement to the Grand Jury?

B.

Under the circumstances presented above, is a conviction for Perjury a condition precedent to the Government's unilateral declaration that the original plea agreement is void?

LIST OF PARTIES

All parties appear in the caption of the case in this Court.

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OPINION BELOW

The decision of the Court of Appeals, not reported or published, appears in the Appendix hereto. (Appendix A). No relevant opinion was rendered by the United States District Court for the Southern District of Indiana.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 15, 1983. A timely petition for rehearing, and suggestion for rehearing in banc, was denied on June 7, 1983. (Appendix B). This petition for certiorari was filed within sixty days of that date. The Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States of America:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived or life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation. (Emphasis Added)

STATEMENT OF THE CASE

In 1977, Petitioner Verrussio (hereinafter called Verrussio) was arrested at Indianapolis International Airport, allegedly in possession of a quantity of cocaine. Thereafter, in June, 1979, he was indicted on that and other unrelated drug offenses. That Indictment was captioned *United States of America v. George Michael Verrussio*, and bore cause number IP79-44-CR. A copy of that Indictment is contained in the Appendix. (Appendix C).

Subsequent to his indictment in 1979, Verrussio entered into a plea bargain. The terms of the plea agreement provided that Verrussio would plead guilty to Count VI of IP79-44-CR. Count VI was a misdemeanor charge of Possession of Cocaine. The factual basis of Count VI was unrelated to the 1977 arrest. In consideration for that plea, all other counts of the Indictment and all other potential charges, which could have been lodged against Verrussio, would be either dismissed or not filed. This included all charges pertaining to the 1977 arrest.

Additionally, Verrussio was to testify before the United States Grand Jury for the Southern District of Indiana and give statements, when requested, to agents of the United States Attorney's office and the Drug Enforcement Administration. Pursuant to the plea agreement,

Verrussio was required to and did serve thirty (30) nights in the Monroe County, Indiana, jail and was placed on probation for a period of one (1) year. Verrussio completed the period of probation without objection by the Government.

Verrussio was summoned to testify and did testify before the United States Grand Jury for the Southern District of Indiana on December 8, 1980.

Subsequent to Verrussio's testimony and prior to termination of his probation, the United States Attorney's Office received information which indicated that Verrussio had not been truthful in statements to agents, statements to the United States Attorney's office, or in his Grand Jury testimony. (See Stipulation of Parties attached hereto and incorporated by reference herein). (Appendix D) The Government did not act in any timely manner upon this information. It did not petition the Court which sentenced Verrussio to extend or terminate his probation or set aside the plea bargain. Rather, the Government allowed Verrussio to complete his period of probation without any challenge whatsoever.

Thereafter, in 1982, the United States Grand Jury for the Southern District of Indiana returned an indictment against Verrussio and others. (Appendix E) Verrussio is named in four (4) counts. Counts I, II, and III of the 1982 indictment, pertain to the 1977 arrest, and are counts which, the Government concedes, (see Stipulation), were counts which were dismissed and/or not filed pursuant to the 1979 plea bargain. Count IV is an allegation of perjury before the Grand Jury. The substance of Count IV is that Verrussio lied to the Grand Jury when he said, that in 1977, he was a courier for a drug organization headed by Fred McCord. The Government contends that Verrussio was in fact a seller for the McCord organization.

Verrussio moved to dismiss Counts I, II, and III, based upon a violation of his right to be free of double jeopardy.

The motion to dismiss was denied and an appeal of that denial was taken to the Seventh Circuit Court of Appeals. This petition seeks a review of that court's ruling that jeopardy did not attach, and that the 1979 plea agreement was "null and void."

Count IV was originally severed for trial from the other counts and was to be tried prior to Counts I, II, and III. (Order of District Court- Appendix F). Count IV was subsequently dismissed by the District Court pursuant to the requirements of the Speedy Trial Act (Appendix G). To date, Count IV has not been reinstated.

On June 6, 1983, a trial of Counts I, II, and III was to have commenced. Prior to trial, the court sustained a motion to suppress directed at Verrussio's 1977 arrest and the seizure of cocaine resulting therefrom. The Government has filed a notice of appeal from the court's ruling.

REASONS THE WRIT SHOULD BE GRANTED

I.

Does Jeopardy Attach to Criminal Charges Dismissed or not Filed by the Government, Pursuant to a Plea Agreement, When an Individual is Convicted and Sentenced on Other Related Charges as a Result of that Plea Agreement?

The Second Circuit Court of Appeals has held that a claim by a defendant that the Government was improperly "refiling" charges dismissed pursuant to a plea bargain is a decision appealable prior to trial. *U.S. v. Allessi*, 536 F.2d 978 (2nd Cir. 1976), *on remand*, 544 F.2d 1139 (2nd Cir. 1976); *see also U.S. v. Griffin*, 617 F.2d 1342, (9th Cir. 1980), *U.S. v. Venable*, 585 F.2d 71 (3rd Cir. 1978). While the Second Circuit Court did not expressly state the reason for its holding, it has made it clear the double jeopardy and due process considerations of such a claim are of sufficient magnitude that an appeal from an adverse decision should be prior to trial, rather than after conviction. Implicit in

this holding is the proposition that jeopardy attaches to charges dismissed or not filed pursuant to a plea bargain on other charges. Petitioner submits that this Court should recognize the soundness of this position and sustain the position of the Second Circuit Court.

While there are various reasons why the government or a defendant would enter into a plea bargain, clearly finality and certainty of disposition are among the most obvious motives. Because of this, the same interests obtain in this context as exist in the traditional double jeopardy context.

This Court recognized many of the relevant considerations in *U.S. v. Abney*, 431 U.S. 654, (1977). In *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757 (1970), this Court said:

> The prohibition is not against being twice punished, but being twice put in jeopardy. The twice put in jeopardy language of the Constitution thus relates to a potential i.e., the risk that an accused for a second time will be convicted of the same 'offense.'

In *Abney, supra.*, the Court recognized:

> 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, *thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the posibility that even though innocent he may be found guilty.' Green, supra*, 355 U.S. at 187-88, 78 S.Ct. 221, 223. (Emphasis added).

Accord, *Breed v. Jones*, 421 U.S. 519, 529-530, 95 S.Ct. 1779, 1785-86, 44 L.Ed.2d 346 (1975); *Serfass v. United States*, 420 U.S. 377, 387-388, 95 S.Ct. 1055, 1061-1062, 43 L.Ed.2d 265 (1975); *Jorn, supra*, 400 U.S. at 479, 91 S.Ct. at 554. Obviously, these aspects of the guarantee's protections would be lost if the accused

were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs. 97 S.Ct. 2034 at 2040, 2041.

Thus, Petitioner submits that when considered in light of the interests served by the Double Jeopardy Clause, it is clear that jeopardy does attach to a charge dismissed or not filed as a result of a plea agreement.

The decision of the Court of Appeals of the Seventh Circuit creates a conflict between the Seventh Circuit and Second Circuit on this issue.

Petitioner contends that the position of the Second Circuit Court, considered in light of the decisions of this Court, in *Abney*, is correct. As the second Circuit said in *Allessi*:

> The government urges at the outset that Judge Judd's order is interlocutory and thus non-appealable under the well-settled doctrine limiting review to final orders, see 28 U.S.C. §1291. We disagree. While it is of course true, in most instances, that a district judge's refusal to dismiss an indictment is reviewable only if and when a judgment of conviction is entered against the defendant, *United States v. Garber*, 413 F.2d 284, 285 (2d Cir. 1969), this court has carved an exception to that general rule when the motion to dismiss is based upon a claim of double jeopardy. *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975).
>
> The purpose of the Double Jeopardy Clause of the Fifth Amendment is to insure that no individual will twice be held to answer for the same charge. See

United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) (plurality opinion of Harlan, J.). "[It's] prohibition is not against being twice punished, but against being twice put in jeopardy," *United States v. Ball*, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896). A defendant who is required to await the completion of allegedly duplicative proceedings against him before being allowed to vindicate his double jeopardy rights, has already and irreparably lost to a large degree the protection which the right was meant to afford him. It is in just such instances that the Supreme Court has recognized the propriety of interlocutory review. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

Although the present appeal is based on due process grounds—i.e., that the government has failed to fulfill an earlier promise not to prosecute—it is apparent that similar interests are at stake. We implicitly held so much when, in January of this year, we issued a writ of mandamus directing that Alessi's identical contention, raised in the context of another criminal case in which he was involved, be resolved before trial was commenced. *United States v. Alessi*, Dkt. No. 76-1021 (2d Cir. Jan. 20, 1976).

The government argues that *Beckerman* should be restricted to those situations where the defendant has already undergone the trauma of a first trial and should be inapplicable where, as here, Alessi pleaded guilty to the earlier indictment. Even were we to accept the debatable proposition that there is less stress involved in pleading guilty than in standing trial, we fail to see how the distinction bears any relevance to the purposes of the Double Jeopardy Clause, as outlined above.

Petitioner respectfully requests this Court to reverse the holding of the Seventh Circuit that jeopardy does not attach to charges dismissed pursuant to a plea agreement.

II.

A.

Is the Petitioner's Right to be Free of Double Jeopardy and Right to Due Process of Law Offended When the Government, Without Prior Court Sanction, Reinstated Criminal Charges Previously Dismissed Pursuant to a Plea Agreement, When the Petitioner was Convicted and Sentenced on Other Charges as Part of the Plea Agreement, and When, After Completion of the Petitioner's Sentence, the Government Learns that the Petitioner May Have Violated a Portion of the Plea Agreement by Giving a False Statement to the Grand Jury?

Whether jeopardy attaches to a charge dismissed or not filed as a result of a plea agreement, is a most important question of criminal and Constitutional law. That question derives its significance from the procedural questions presented here by the Petitioner. If jeopardy attaches to charges dismissed pursuant to a plea agreement, then Petitioner submits that due process and double jeopardy considerations require that the Government must either seek some form of judicial approval before reinstating dismissed charges or must convict petitioner for those crimes which the Government believes constitute a breach of the plea agreement.

Petitioner submits that the error of the Seventh Circuit's analysis on this issue is obvious. A party entering into a plea agreement has the right to have that agreement honored. *Santabello v. New York*, 404 U.S. 257, 30 L.Ed. 427, 92 S.Ct. 495 (1971). Any procedures under which the agreement is dishonored or avoided should be scrutinized most carefully.

As this Court said in *Santabello*, when analyzing the due process consideration of plea bargaining:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of

guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumsances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Petitioner submits that to allow the government to unilaterally declare a plea agreement void, and to rescind that agreement without any prior court sanction, affects the core of the American criminal justice system. For as this Court has noted:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.
>
> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be rehabilitative prospests of the guilty when they are ultimately imprisoned. See *Brady v. United States*, 397 U.S. 742, 751-752, 90 S.Ct. 1463, 1470-1471, 25 L.Ed.2d 747 (1970).
>
> *Santabello, supra*

If the Government may unilaterally declare a plea

agreement void, then, there can be no plea bargaining. It would be foolish to enter into a plea, knowing that if events changed, the Government could claim "a breach" and without court approval, rescind the agreement.

The Seventh Circuit held that a plea agreement is a contract and that Petitioner's alleged "failure to testify truthfully rendered the contract null and void." (Decision of April 15, 1983—Appendix A). Petitioner agrees that there are some contractual aspects to a plea agreement. However, those contractual aspects exist only with judicial sanction. Unlike a true contract, a plea agreement is rarely binding until the bargain is approved and accepted by the Court. *Santabello, supra*. Thus, the Court is a real party to the contract, and perhaps the most important party, because the court, by withholding approval, can defeat the contract. Because a bargain must be ratified by the court, it is not within the authority of either party to declare the bargain void abinitio. The Petitioner submits that the Seventh Circuit overlooked some obvious practical implications to its decision.

To allow unilateral rejection of a plea agreement, after completion of one of the terms by either side, without court approval, creates the risk of allowing either party to declare the bargain void on a whim. To allow unilateral avoidance of a plea agreement allows either party to use the plea bargaining process to gain a substantial advantage.

Some examples may be helpful: A defendant and the government enter into a plea agreement. The agreement, in part, calls for incarceration. The defendant concludes, after commencment of his sentence, that the agreement is null and void, owing to an alleged breach by the government. May the defendant leave prison and set up the fact that, in his judgment, the plea agreement was void as a defense to escape charges?

Or, a defendant, instead of being sent to prison, is placed on probation. During his probation, he concludes the plea

agreement is void. May he simply inform the probation officer that he believes the plea agreement to be void, and that he no longer is "on probation?"

The obvious answer to both of these questions is: "of course not." This Court would certainly require that before the defendant could take such action, he would have to petition the Court which approved the plea agreement to have it set aside.

This is exactly the circumstance that the Seventh Circuit overlooked in the instant case. Petitioner submits that it is of extreme importance that this Court not tolerate any procedures under which either party could unilaterally avoid a plea agreement. In Petitioner's case, due process of law and the right to be free of double jeopardy commands such a holding.

It has never been judicially determined that Verrussio *in fact* lied to the Grand Jury. He is presumed to be innocent. The Government, believing he lied, did nothing to assert its rights in the court which approved the plea bargain. Rather, it elected to sit on its rights, and a year later, act unilaterally. This action is improper and deprives Petitioner of due process of law, and violates Petitioner's right to be free of double jeopardy. Sound judicial policy should not permit the Government's actions.

II.

B.

Is a Conviction for Perjury a Condition Precedent to the Government's Unilateral Declaration that the Original Plea Agreement is Void?

Petitioner submits that, in the absence of court approval, prior to reinstating the charges, before he can be tried on Counts I, II, and III, he must first be tried and convicted of perjury. Only then will it have been established that petitioner did in fact breach the original plea agreement. It

must be stressed that petitioner does not contest the right of either party to set aside a plea based upon a perceived breach of the agreement. He challenges the right of the Government to unilaterally set the plea aside without prior court sanction.

This case demonstrates the exceptional problems created by allowing the Government to unilaterally void a plea agreement. Petitioner was arrested in 1977. In 1980, he was convicted and sentenced. He has testified before the Grand Jury. He had the right to believe that his involvement with the law was over. He could properly believe that the 1977 episode was put to rest. In 1982, without warning, he was reindicted upon the 1977 charges. When its acts were challenged, the Government responded that the 1980 plea agreement was "void abinitio" due to Verrussio's alleged perjury.

Yet, Verrussio has not been tried for perjury; he has not had his opportunity to demonstrate that the charges are unfounded. He has never been accorded a hearing to rebut the Government's claim that he breached the plea agreement. In fact, at this time, the charges are no longer pending. Yet, relying upon unproven charges, the Government persists in claiming that the 1980 plea agreement, upon which Verrussio did thirty days and one year probation, is "null and void."

This Court surely recognizes that Federal criminal investigations routinely involve case disposition by plea agreements which require either court and/or Grand Jury testimony. Often various witnesses present differing accounts of the same event before a court or Grand Jury. 18 U.S.C. 6001 could authorize indictment whenever there is a material conflict between two witnesses.

If the Government can declare a plea agreement null and void, and rescind it, without prior court approval or without first convicting the defendant of the acts which it claims constitute a breach, then one entering into a plea

agreement requiring testimony enters into a situation where he remains "at risk" for many years. Rather than promoting finality, a plea agreement becomes a continuing item which the Government can continue to accept, or can decide to reject as its whim or needs dictate.

This Court should reject a transfer of this type of power from the courts to the prosecutor.

CONCLUSION

For all the foregoing reasons, Petitioner requests that a writ of certiorari issue to reverse the judgment of the Seventh Circuit Court of Appeals entered on April 15, 1983.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 15, 1983

Before
Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

UNITED STATES OF AMERICA,	) Appeal from
	) the United
Plaintiff-Appellee,	) States
	) District
	) Court for the
No. 82-3078 vs.	) Southern
	) District of
	) Indiana,
GEORGE M. VERRUSSIO,	) No. 82 CR 75
	) Judge William
Defendant-Appellant.	) E. Steckler

The Court has considered the following documents:

1. The "MEMORANDUM OF LAW IN SUPPORT OF THE JURISDICTION OF THE SEVENTH CIRCUIT COURT OF APPEALS" filed herein on January 10, 1983, by counsel for the defendant-appellant.
2. The "GOVERNMENT'S RESPONSE PURSUANT TO COURT'S ORDER OF DECEMBER 29, 1982" filed herein on January 10, 1983, by counsel for the plaintiff-appellee.

In 1979, appellant Verrussio was indicted and charged with possession of controlled substances. The indictment contained nine counts. Following his indictment, appellant entered into a plea bargain whereby he would plead guilty to Count VI of the indictment in exchange for the dismissal of all other counts. The terms of the plea agreement also

required that appellant testify before the grand jury. Appellant testified before the grand jury and the government voluntarily dismissed all counts of the indictment except Count VI.

Subsequent to appellant's testifying before the grand jury, the government received information indicating that the testimony was, in fact, perjured. As a result, the government viewed the appellant's conduct as a breach of the plea agreement and reindicted him in 1982 on three counts of the prior indictment. Appellant contends that the government cannot prosecute him on Counts I through III of the new indictment because he was previously put in jeopardy on those counts as a result of the plea agreement. Additionally, he maintains that this Court has jurisdiction to review under *U.S. v. Abney*, 431 U.S. 654 (1977) the denial of his motion to dismiss based on double jeopardy. *Abney* carves out an exception to the general rule that denial of a pre-trial motion to dismiss is not appealable.

Appellee, on the other hand, asserts that the district court order does not fit within the *Abney* exception because the plea agreement was not performed. Consequently, it is appellee's position that jeopardy never attached on the eight counts in the original indictment voluntarily dismissed by the government.

We are convinced that this case does not fit within the *Abney* exception because jeopardy never attached with respect to the eight counts voluntarily dismissed by the government. The Double Jeopardy clause is "a guarantee against being twice put to trial for the same offense." *U.S. v. Abney*, supra, 431 U.S. at 661. Here, appellant was never put to trial. Instead, the counts against him were dismissed pursuant to a plea agreement. Because "[a] plea bargain is a contract," *U.S. v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981), appellant's failure to testify truthfully before the grand jury rendered the agreement null and void. Accordingly, this interlocutory appeal is DISMISSED for lack of jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 7, 1983

Before
Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
No. 82-3078	)	Appeals from the United States
GEORGE M. VERRUSSIO, *Defendant-Appellant*	)	District Court for the Southern
	)	District of
GEORGE M. VERRUSSIO, *Petitioner,*	)	Indiana, Indianapolis Division.
No. 83-1993	)	No. 82 CR 75
HON. WILLIAM E. STECKLER, Judge, United States District Court for the Southern District of Indiana, Indianapolis Division, Respondent.	)	Judge William E. Steckler

This matter comes before the court for its consideration of the following documents:

1. "PETITION FOR LEAVE TO FILE PETITION

FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC INSTANTER" filed herein on May 5, 1983, by counsel for the appellant.

2. "VERIFIED ALTERNATIVE PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION" filed herein on June 1, 1983, by counsel for the appellant.

3. "GOVERNMENT'S RESPONSE TO PETITIONER VERRUSSIO'S VERIFIED ALTERNATIVE PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION AND GOVERNMENT'S MOTION FOR MANDATE" filed herein on June 2, 1983, by counsel for the appellee.

In consideration thereof,

IT IS ORDERED that these appeals are hereby CONSOLIDATED for the purpose of resolution.

IT IS FURTHER ORDERED that the appellant's motion for leave to file petition for rehearing is hereby GRANTED.

IT IS ALSO FURTHER ORDERED that petitioner's petition for rehearing is DENIED.

IT IS ALSO FURTHER ORDERED that petitioner's verified petition for writ of mandate and/or prohibition is hereby DENIED.

In accordance with Circuit Rule 17, the mandate in these appeals shall issue in seven days.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
NO. IP 79-44-CR

UNITED STATES OF AMERICA	)
	)
V.	)
	)
GEORGE MICHAEL VERRUSIO	)

INDICTMENT

COUNT 1

The Grand Jury charges that:

On or about the 19th day of December, 1977, in the Southern District of Indiana, GEORGE MICHAEL VERRUSIO, knowingly, wilfully and unlawfully did possess with intent to distribute approximately 663.93 grams of cocaine, a Schedule II, Narcotic Drug Controlled Substance, in violation of Section 841(a)(1), Title 21, United States Code.

COUNT 2

The Grand Jury further charges that:

On or about the 19th day of December, 1977, in the Southern District of Indiana, GEORGE MICHAEL VERRUSIO, knowingly and intentionally did possess 27.96 grams of cocaine, a Schedule II, Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 844(a).

COUNT 3

The Grand Jury further charges that:

On or about the 19th day of December, 1977, in the

Southern District of Indiana, GEORGE MICHAEL VERRUSIO, unlawfully, knowingly, and intentionally did possess 3 grams of marijuana, a Schedule I, Controlled Substance, in violation of Title 21, United States Code, Section 844(a).

(Counts 4 and 5 omitted)

COUNT 6

The Grand Jury further charges that:

On or about the 7th day of December, 1978, in the Southern District of Indiana, GEORGE MICHAEL VERRUSIO, unlawfully, knowingly and intentionally did possess approximately .02 grams of cocaine, a Schedule II, Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 844(a).

(Counts 7 through 9 omitted)

A TRUE BILL:

/s/ Phyllis J. Hobson

Deputy Foreman

/s/ Virginia Dill McCarty

United States Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
NO. IP 82-75-CR-05

UNITED STATES OF AMERICA	)
	)
VS	)
GEORGE M. VERRUSSIO	)

STIPULATION

Comes now the Defendant, by and through his attorney Richard Kammen, and the Government by and through Kennard Foster, Assistant United States Attorney, who stipulate as follows:

1. If called to testify as a witness during a hearing on the Defendant's Motion to Dismiss, Kennard Foster would testify as follows:

a. That he is an attorney duly admitted to practice law in the State of Indiana and the United States District Court for the Southern District of Indiana.

b. That at all times material herein, he was the Assistant United States Attorney assigned to participate in the investigation and prosecution of George Verrussio, Thomas Smith, Fred McCord and others, which investigation resulted in the filing of an indictment bearing cause number IP79-44-CR, which indictment was filed in the United States District Court for the Southern District of Indiana.

c. That as a result of the filing of that indictment, Kennard Foster, on behalf of the Government, and the Defendant personally and by and through his attorney, David Coleman, entered into the following plea bargain:

i. That the Defendant would plead guilty to Count 6 of the indictment bearing cause number IP79-44-CR.

ii. That the Counts 1, 2, 3, 4, 5, 7, 8 and 9 of the indictment bearing cause number IP79-44-CR would be dismissed.

d. During negotiations leading up to the plea bargain, facts were disclosed which indicated to the Government that Defendant Verrussio was in some manner involved in a conspiracy with Fred McCord, Thomas Smith and others to transport cocaine. It was agreed as a part of the negotiations and plea bargain that any charges not charged in the indictment, but known to the Government such as a possible conspiracy charge would not be filed. It also was contemplated that no additional charges, the substance of which was unknown to the Government but occurring as part of the same alleged conspiracy and within the relevant time period would not be filed.

e. The terms and conditions of the plea bargain contemplated that the Defendant would appear and testify before the United States Grand Jury for the Southern District of Indiana. It was further contemplated that Defendant Verrussio would give statements to various law enforcement agencies and it was contemplated that those statements would be truthful.

f. At all times when requested, Defendant Verrussio appeared for examination and/or statement. It is the Government's belief that George Verrussio was not truthful during his Grand Jury testimony and statements, to other agents and me. It is this belief which causes the Government to allege that he breached the plea bargain reached in IP79-44-CR.

g. Defendant Verrussio was [sic] gave a statement to agents at the time of his arrest. He further gave a statement to agents on January 22, 1979. Defendant Verrussio was summoned to testify and did testify on December 8, 1980. The substances of these statements and testimony was substantially identical.

h. Commencing in January, 1981 and through

July, 1981, I received information from several sources which indicated to me that Defendant Verrussio had not been truthful in his prior Grand Jury testimony and statements to other agents and me.

i. In July, 1981, Defendant Verrussio was again summoned to appear before the United States Grand Jury for the Southern District of Indiana and appeared pursuant to said summons. Verrussio was not asked to testify because he reiterated to me and others the substance of his prior statements which I believed to be false.

j. Verrussio had been sentenced on February 15, 1980 and was on probation until February 15, 1981.

2. The parties stipulate that the foregoing would be the testimony of Kennard Foster if subpoenaed to testify.

Respectfully submitted,

/s/ Richard Kammen

Richard Kammen
McCLURE, McCLURE & KAMMEN
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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
NO. IP 82-75-CR-05

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs	)
	)
EVERETT TOWERS a/k/a	)
Everett Ferris,	)
Frank Graves, Evey;	)
JEFFERY A. DOYLE a/k/a	)
David Woods;	)
JAMES L. BARRON,	)
DENNY WILLIAMSON,	)
GEORGE M. VERRUSIO a/k/a	)
Victor P. Packer,	)
G. Congers;	)
THOMAS C. SMITH,	)
STANLEY ALBRIGHT,	)
RONALD KIKENDALL,	)
GINA HOLLAND,	)
KERRI WHITEHEAD,	)
	)
Defendants.	)

INDICTMENT

COUNT I

The Grand Jury charges that:

From on or about September, 1976, the exact date being to the grand jury unknown, and continuing thereafter to and including the 23rd day of January, 1981, within the Southern District of Indiana and elsewhere, EVERETT

TOWERS a/k/a Everett Ferris, Frank Graves, Evey (hereinafter referred to as EVERETT TOWERS), JEFFERY A. DOYLE a/k/a David Woods (hereinafter referred to as JEFFERY A. DOYLE), JAMES L. BARRON, DENNY WILLIAMSON, GEORGE M. VERRUSIO a/k/a Victor P. Parker, G. Congers (hereinafter referred to as GEORGE M. VERRUSIO), THOMAS C. SMITH, STANLEY ALBRIGHT, RONALD KIKENDALL, GINA HOLLAND, KERRI WHITEHEAD and others known and unknown to the grand jury, did unlawfully, knowingly and wilfully conspire and agree together to commit offenses against the United States in that they conspired and agreed together to unlawfully, knowingly and wilfully possess with intent to distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

Overt Acts

In furtherance of said conspiracy and to effect the objects thereof, the defendants committed, among others, the following overt acts:

(Items 1 through 7 omitted)

8. On or after February, 1977, until December, 1977, a person known to the Grand Jury did travel on numerous occasions from Ft. Lauderdale, Florida to Bloomington and Indianapolis, Indiana, and their surrounding areas where he distributed large quantities of cocaine which he received from EVERETT TOWERS, JEFFERY A. DOYLE and a person known to the Grand Jury to GEORGE M. VERRUSIO and persons known to the grand jury.

9. On or about February, 1977, until on or about December 1, 1977, GEORGE M. VERRUSIO and other persons known to the grand jury traveled from Bloomington and Indianapolis, Indiana and their surrounding areas to Ft. Lauderdale, Florida, where

GEORGE M. VERRUSIO and other persons known and unknown to the grand jury purchased large quantities of cocaine from EVERETT TOWERS, JEFFERY A. DOYLE and persons known to the Grand Jury.

(Item 10 omitted)

11. On or about December 8, 1977, a person known to the Grand Jury traveled by a leased jet from Ft. Lauderdale, Flordia to Indianapolis, Indiana, where he delivered approximately two kilograms of cocaine to GEORGE M. VERRUSIO.

(Items 12 through 15 omitted)

16. On or about December 18, 1977, GEORGE M. VERRUSIO and THOMAS C. SMITH traveled from Indianapolis, Indiana, to Ft. Lauderdale, Florida, where they registered at the Marina Bay Motel at Ft. Lauderdale, Florida.

17. On or about December 18, 1977, EVERETT TOWERS, JEFFERY A. DOYLE and Frederick Robert McCord delivered one kilogram of cocaine to GEORGE M. VERRUSIO and THOMAS C. SMITH at Marina Bay Motel, Ft. Lauderdale, Florida.

18. On or about December 19, 1977, GEORGE M. VERRUSIO and THOMAS C. SMITH traveled by Eastern Airlines from Ft. Lauderdale, Florida, to Indianapolis International Airport, where approximately seven hundred grams of cocaine was seized from GEORGE M. VERRUSIO's luggage by Special Agents of the Drug Enforcement Administration, Narcotics Detectives of the Indianapolis Police Department and the Airport Police.

(Items 19 through 37 omitted)

All in violation of Title 21, United States Code, Section 846.

COUNT 2

The Grand Jury further charges that:

On or about December 8, 1977, in the Southern District of Indiana, EVERETT TOWERS, JEFFERY A. DOYLE, GEORGE M. VERRUSIO, and a person known to the grand jury, did knowingly, wilfully and unlawfully possess with intent to distribute and distribute approximately two kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 3

The Grand Jury further charges that:

On or about December 19, 1977, in the Southern District of Indiana, EVERETT TOWERS, JEFFERY A. DOYLE, GEORGE M. VERRUSIO, THOMAS C. SMITH and a person known to the grand jury, did knowingly, wilfully and unlawfully possess with intent to distribute and distribute approximately seven hundred grams of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 4

The Grand Jury further charges that:

1. On or about the 8th day of January, 1980, at Indianapolis, Indiana, in the Southern District of Indiana, GEORGE M. VERRUSIO, while under oath as a witness in a Grand Jury proceeding before the Grand Jury for the Southern District of Indiana, December Grand Jury, Misc. No. 79-80 which Grand Jury was duly empanelled and lawfully convened, did knowingly and wilfully make false material declarations that is to say:

2. At the time and place aforesaid, the Grand Jury was engaged in the aforementioned Grand Jury proceeding, which was an inquiry into possible violations of federal law,

said violations being in the nature of conspiracy to possess with intent to distribute and distribution of controlled substances and the distribution of controlled substances in violation of Title 21, United States Code, Sections 846 and 841(a)(1).

3. It was a matter material to said proceeding to determine whether or not GEORGE M. VERRUSIO was a courier for a certain group of individuals who were distributing cocaine, a Schedule II Narcotic Drug Controlled Substance in the Southern District of Indiana and elsewhere, or whether GEORGE M. VERRUSIO was himself an associate or client of that group of individuals who were distributing cocaine in the Southern District of Indiana and elsewhere, and himself a distributor of cocaine.

4. During the course of his testimony before the Federal Grand Jury, on January 8, 1980, at the place aforesaid, while under oath, GEORGE M. VERRUSIO, did knowingly declare, in substance, with respect to the aforesaid material matters that he (GEORGE M. VERRUSIO) was a courier or transporter of cocaine for a group of individuals or individual who was transporting large quantities of cocaine from in and around Ft. Lauderdale, Florida to the Southern District of Indiana, and that he was not an associate or client of individuals or an individual who was distributing and transporting large quantities of cocaine from Ft. Lauderdale, Florida to the Southern District of Indiana and elsewhere and further, that he was not a distributor of cocaine himself. More specifically, at the time and place aforesaid, GEORGE M. VERRUSIO, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matters, as follows:

(Testimony omitted)

5. The aforesaid testimony of GEORGE M. VERRUSIO as he then and there well knew and believed was false, in

that GEORGE M. VERRUSIO was during the year 1977 an associate or client of a group of individuals who were distributing cocaine in the Southern District of Indiana and elsewhere, and that GEORGE M. VERRUSIO himself as an associate or client was a distributor of cocaine and not a courier or simple transporter of cocaine for that group of cocaine dealers.

All in violation of Title 18, United States Code, Section 1623.

(Counts 5 through 16 omitted)

A TRUE BILL:

/s/ John J. Mainen

Foreman

/s/ Richard L. Darst

First Assistant United States Attorney

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
IP 82-75-CR-05

UNITED STATES OF AMERICA	)
	)
VS	)
GEORGE M. VERRUSSIO	)

ORDER OF DECEMBER 17, 1982

This case is before the Court on defendant Verrussio's motion to dismiss all four (4) counts of a sixteen (16) count indictment which name him as a defendant, and, as an alternative, on a motion to sever Count 4 from Counts 1, 2, and 3. The Court has considered the arguments advanced by both parties in their legal briefs and at oral argument, in addition to considering the evidence submitted at the oral argument. After giving due consideration to their arguments and the evidence, the Court DENIES Verrussio's motion to dismiss. The motion to sever is GRANTED with Verrussio to stand trial on Count 4 prior to trial on the remainder of the indictment.

IT IS SO ORDERED.

/s/ William E. Steckler
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
IP 82-75-CR-05

UNITED STATES OF AMERICA)
)
VS)
)
GEORGE M. VERRUSSIO)

ORDER OF 18th MAY, 1983

This criminal case is before the Court on two motions to dismiss the indictment against the defendant Verrussio.

In the first such motion Verrussio challenges Counts I, II, and III on the ground that his right to a speedy trial was violated because these current counts are based upon prior charges in an earlier indictment one to which he pled guilty. However, this plea bargain was allegedly breached, thereby making it null and void, when Verrussio allegedly perjured himself before a grand jury. Verrussio now argues that since the plea agreement did not legally exist, he should have been tried on the prior charges within the time limits of the Speedy Trial Act, 18 U.S.C. §3161, *et seq.*

Verrusio's argument requires current Counts I through III to be the same as the prior charges. In fact an examination of both indictments reveals that only current Count III constitutes a reindictment, specifically, of original Count I. Therefore, his §3161 argument is relevant only to current Count III. With regard to original Count I the Government could not reindict Verrussio in current Count III until it possessed a sufficient basis to infer he had breached the plea agreement. This basis did not exist until the grand jury indicted him in current Count III. At that time the speedy trial time constraints became applicable.

This Court's review of the record reveals that Count III has been brought to trial within the requirements of 18 U.S.C. §3161. Accordingly, Verrussio's speedy trial argument is unpersuasive and his motion to dismiss Counts I through III is DENIED.

In the second dismissal motion Verrussio argues that since this Court severed Count IV from Counts I through III, he should have been brought to trial separately on Count IV within seventy (70) days of severance. Having considered this matter, the Court has concluded that Count IV should be dismissed without prejudice. 18 U.S.C. §3162(a)(2).

Section 3162(a)(2) of Title 18, United States Code, provides:

> "(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice."

The Court has utilized the above factors to determine whether the dismissal shall be without without prejudice. Count IV charges perjury before the grand jury. This is a most serious charge because truth and veracity are the cornerstones of this country's jury system. The second factor, facts and circumstances of the case, suggests that the approximate eleven-week delay (Count IV is currently set for trial on May 23, 1983, and should have been tried by

March 7, 1983) was caused by confusion as to the effect of Verrussio's interlocutory appeal of this Court's denial of his prior motion to dismiss Counts I through III. Apparently the Court's personnel failed to note that Count IV was severed and, therefore, not included in the appeal. Finally, the purpose of the Speedy Trial Act will not be advanced where Verrussio has failed either to allege or prove any prejudice caused by this eleven-week delay.

By reason of the foregoing, the Court hereby GRANTS Verrussio's motion and DISMISSES Count IV without prejudice.

IT IS SO ORDERED.

/s/ William E. Steckler
United States District Judge

No. 83-78

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE M. VERRUSSIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

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QUESTION PRESENTED

Whether a criminal defendant may appeal the district court's denial of his motion to dismiss an indictment that he claimed had been improperly reinstated following his breach of a plea bargain.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-78

GEORGE M. VERRUSSIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1983. A petition for rehearing was denied on June 7, 1983. The petition for a writ of certiorari was filed on July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 22, 1979, a grand jury in the United States District Court for the Southern District of Indiana indicted petitioner on eight counts of possessing controlled substances with intent to distribute, in violation of 21 U.S.C. 841(a)(1). During plea negotiations, the government

obtained information that petitioner was involved in a conspiracy to transport cocaine. Thereafter petitioner entered a plea bargain whereby he pled guilty to one of the possession counts and agreed to cooperate with the government and to testify truthfully before the grand jury. In exchange, the government dismissed all but the one possession count to which petitioner pled guilty and agreed not to charge petitioner with any additional offenses then known to the government, arising out of the alleged conspiracy (Pet. App. A7-A8). Petitioner was sentenced to serve 30 nights in the Monroe County, Indiana jail and was placed on probation for one year.

On January 8, 1980, petitioner testified before the grand jury. During the course of his testimony, he stated that he was merely a courier of cocaine between Fort Lauderdale and the Southern District of Indiana, that he was not an associate or client of the individuals for whom he was working, and that he was not himself a distributor of cocaine. Gov. Exh. 2; see Pet. App. A15. Thereafter, the government received information indicating that his testimony was perjured (Pet. App. A7). The government viewed petitioner's conduct as a breach of the plea agreement and therefore obtained a second indictment charging him with two counts of possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Counts 2 and 3); one count of conspiring to commit that offense, in violation of 21 U.S.C. 846 (Count 1); and one count of testifying falsely before a grand jury, in violation of 18 U.S.C. 1623 (Count 4). Only the offense alleged in Count 3 had been charged in the initial indictment.

2. Petitioner moved to dismiss Counts 1, 2 and 3 of the second indictment on the ground that he had been put in former jeopardy on those counts as a result of the plea agreement. The district court conducted a hearing on the motion. The DEA agent in charge of the investigation

testified at the hearing to the existence of information in "direct contradiction" to petitioner's grand jury testimony (Tr. 17-18).[1] The agent described statements made to him and to the grand jury by the co-conspirators and other sources regarding petitioner's role in the conspiracy (Tr. 17-46).

The district court denied petitioner's motion to dismiss Counts 1 through 3 on the basis of "the evidence submitted at the [hearing]" (Pet. App. A17). Upon a subsequent motion by petitioner, the court dismissed the perjury count without prejudice on speedy trial grounds (*id.* at A19-A20).[2]

3. Petitioner sought interlocutory review of the district court's order denying his motion to dismiss Counts 1 through 3, invoking *Abney* v. *United States*, 431 U.S. 651 (1977). The court of appeals dismissed the appeal for lack of jurisdiction (Pet. App. A1-A2), holding that "this case does not fit within the *Abney* exception because jeopardy never attached with respect to the eight counts voluntarily dismissed by the government" (*id.* at A2). The court also stated that petitioner's "failure to testify truthfully before the grand jury rendered the [plea] agreement null and void" (*ibid.*).[3]

ARGUMENT

Petitioner contends that the court of appeals erred in dismissing his interlocutory appeal from the district court's

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[1]"Tr." refers to the transcript of the hearing dated November 19, 1982.

[2]The court attributed the 11-week delay in trial on the perjury charge to "confusion as to the effect of [petitioner's] interlocutory appeal of this Court's denial of his prior motion to dismiss Counts I through III" and the failure of court personnel to note that the perjury charge was severed and not included in the appeal (Pet. App. A21).

[3]In a matter unrelated to this petition, the government has appealed an order suppressing certain evidence arising out of petitioner's arrest.

order denying his motion to dismiss Counts 1 through 3 of the indictment. He argues that the government cannot prosecute him on those counts because he was in former jeopardy with respect to them as a result of the plea agreement. The court of appeals correctly held that jeopardy had not attached as a result of the pretrial dismissal of the original charges against petitioner, and thus that it had no jurisdiction to review the district court's order denying petitioner's motion to dismiss the indictment. Petitioner's claim of a violation of the Double Jeopardy Clause is frivolous, and further review by this Court is unwarranted.

1. The mere invocation of the Double Jeopardy Clause does not entitle a criminal defendant to appeal the denial of a motion to dismiss. *United States* v. *Ritter*, 587 F.2d 41, 43 (10th Cir. 1978); see *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980), cert. denied, 454 U.S. 837 (1981). The claim of former jeopardy "requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense." *United States* v. *MacDonald*, 435 U.S. 850, 862 (1978).

Here, petitioner has failed to make even a colorable showing for, as the court of appeals held, jeopardy had "never attached with respect to the eight counts voluntarily dismissed by the government" pursuant to the plea agreement (Pet. App. A2).[4] This Court has held that jeopardy does not attach until the accused is "put to trial before the trier of the facts, whether the trier be a jury or a judge."

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[4]Even if petitioner's legal analysis were correct, the government would be barred from prosecuting petitioner *on double jeopardy grounds* only for Count 3, since he was not charged in the original indictment with the offenses alleged in Counts 1 and 2. However, the terms of the plea agreement — if the government remains bound by it — would presumably preclude prosecution on Counts 1 and 2 as well.

United States v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion). When charges are dismissed prior to trial, as in this case, jeopardy has not attached. *Serfass* v. *United States*, 420 U.S. 377, 389 (1975).

Petitioner urges this Court to adopt the position that jeopardy attaches to charges dismissed or not filed pursuant to a plea bargain on other charges (Pet. 5), apparently on the reasoning that "the same interests obtain in this context as exist in the traditional double jeopardy context" (*ibid.*). However, this Court has rejected the notion that the concept of former jeopardy should be extended to stages of the criminal justice process that, although not resulting in jeopardy in a "formal or technical" sense, present the "functional equivalent" of it. *Serfass*, 420 U.S. at 389-390. As the Court observed, the constitutional policies underpinning the Double Jeopardy Clause simply are not implicated before that point in the proceedings when the defendant is put to trial before the trier of facts. 420 U.S. at 390-391; see *Crist* v. *Bretz*, 437 U.S. 28, 32-33 (1978).[5] The proceedings concerning petitioner's initial indictment on the dismissed charges did not reach that point.

That the dismissal in this case occurred as part of a plea agreement is beside the point. The government's breach of a plea agreement can be a violation of due process (*Santobello* v. *New York*, 404 U.S. 257 (1971)), but the right of interlocutory appeal under *Abney* applies only to double jeopardy claims.[6] As we have shown, petitioner's reindictment could not constitute double jeopardy because

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[5]As the Court pointed out, when charges are dismissed prior to trial, as they were in this case, the defendant "is often spared much of the expense, delay, strain, and embarrassment which attend a trial." *Serfass*, 420 U.S. at 391.

[6]Significantly, *Santobello* does not so much as refer to the Double Jeopardy Clause, and the lower courts have generally held that breach of a plea bargain by the government is a due process, rather than a

jeopardy had never attached with respect to the dismissed charges in the original indictment. Petitioner's remedy for the alleged breach of the plea agreement, if relief is denied by the district court, is the same as that for any other violation of due process: appeal from final judgment. See *United States* v. *Hollywood Motor Car Co.*, No. 81-1144 (June 28, 1982). The courts of appeals that have considered the issue have therefore rejected appeals from orders denying motions for dismissal of indictments based on assertions of former jeopardy arising from prior plea agreements. *United States* v. *Rosario*, 677 F.2d 614, 615 n.4 (7th Cir.), cert. denied, No. 82-5025 (Oct. 4, 1982); *United States* v. *Eggert*, 624 F.2d 973 (10th Cir. 1980); *United States* v. *Solano*, 605 F.2d 1141, 1142-1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); see also *United States* v. *Brizendine*, 659 F.2d 215 (D.C. Cir. 1981); *United States* v. *Cavin*, 553 F.2d 871 (4th Cir. 1977); but see *United States* v. *Alessi*, 536 F.2d 978 (2d Cir. 1976).[7]

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double jeopardy violation. See *United States* v. *Quigley*, 631 F.2d 415, 416 (5th Cir. 1980); *United States* v. *Solano*, 605 F.2d 1141, 1142-1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); but see *United States* v. *Stricklin*, 591 F.2d 1112, 1123 n.3 (5th Cir.), cert. denied, 444 U.S. 963 (1979) (dictum).

[7]Petitioner relies heavily on *Alessi* (Pet. 4-5, 6-7), but the reasoning in *Alessi* has been rejected in subsequent decisions of this Court. In *Alessi*, which was decided before *Abney*, *MacDonald*, or *Hollywood Motor Car Co.*, the court permitted an appeal from an order denying the defendant's motion to dismiss an indictment for alleged inconsistency with a prior plea bargain. The court acknowledged that the basis for the claim was due process (536 F.2d at 980), but held that such order is appealable because "similar interests are at stake" to those in double jeopardy appeals. *Ibid.* Another panel of the same court in a related case, in an opinion by Judge Friendly, disagreed with this holding but did not urge en banc consideration of the issue because of an expectation that this Court would soon resolve it. *United States* v. *Alessi*, 544 F.2d 1139 (2d Cir.), cert. denied, 429 U.S. 960 (1976). Since *Alessi* was decided, this Court has made clear that the collateral order exception to the final judgment rule does not generally apply to due process claims

Upon determining that there was no substance to petitioner's double jeopardy claim, the court of appeals properly dismissed the appeal. The court's relatively expeditious treatment of the appeal is an example of the "summary procedures * * * to weed out frivolous claims of former jeopardy" endorsed by this Court in *Abney*, 431 U.S. at 662 n.8. See *United States* v. *Head*, 697 F.2d 1200, 1204-1205 (4th Cir. 1982), cert denied, No. 82-1655 (June 20, 1983); *United States* v. *Brizendine*, 659 F.2d at 224-226; *United States* v. *Leppo*, 634 F.2d 101, 105 (3d Cir. 1980); *United States* v. *Dunbar*, 611 F.2d 985, 989 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980).

2. Even assuming arguendo that under some circumstances a criminal defendant has the right to interlocutory appeal concerning alleged violations of a plea agreement by the government, the court of appeals correctly dismissed the appeal in this case. Petitioner cannot challenge the government's fidelity to the plea agreement when he has breached his part of the agreement — "to testify truthfully before the grand jury" (Pet. App. A2). "One who fails to carry out his part of the bargain cannot invoke the agreement against the government." *United States* v. *Gogarty*, 533 F.2d 93, 95 (2d Cir. 1976); see also *United States* v. *Mooney*, 654 F.2d 482, 486 (7th Cir. 1981).

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even when their ultimate vindication on appeal would necessitate a new trial. *Hollywood Motor Car Co., supra;* see also *MacDonald, supra.* "[R]eversal of the conviction and, *where the Double Jeopardy Clause does not dictate otherwise*, the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused." *Hollywood Motor Car Co.*, slip op. at 5 (emphasis added); see also *Abney*, 431 U.S. at 663. Thus the courts of appeals since *Alessi* have unanimously recognized that the defendant's right of appeal in double jeopardy cases does not extend to cases where previous charges were dismissed before trial, pursuant to a plea bargain. Although a conflict technically exists between the Second Circuit, which decided *Alessi*, and the other circuits, the conflict has effectively already been resolved by this Court and does not require further attention.

Here, the government presented evidence at the hearing on petitioner's motion to dismiss showing that three of petitioner's co-conspirators had contradicted his grand jury testimony that he was merely a courier of drugs and not a distributor. In its order denying petitioner's motion the district court took express note of "the evidence submitted at the oral argument" (Pet. App. A17), and its decision constituted an implicit finding that petitioner had not complied with the plea agreement. In dismissing petitioner's interlocutory appeal, the court stated explicitly that petitioner had "fail[ed] to testify truthfully before the grand jury * * *" (*id.* at A2).[8] Since there was no conceivable basis for petitioner's claim of a double jeopardy violation under these circumstances, the court properly dismissed the appeal. See *Abney*, 431 U.S. at 662 n.8.[9]

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[8]Thus, petitioner's claim that no court has "approved" the government's decision to treat the violated plea agreement as void (Pet. 8-11) is belied by the results of the proceedings below. Both the district court and the court of appeals have concluded that petitioner breached the agreement.

[9]Petitioner further argues (Pet. 11-13) that the government could not treat the plea agreement as void without first trying and convicting him for perjury. However, nothing in the plea agreement itself required the government to obtain petitioner's conviction for perjury before cancelling the agreement if petitioner testified falsely, and we are aware of no authority for the proposition that such a requirement may be implied. There is no reason why the giving of false testimony should be treated differently from other violations of plea agreement terms — such as refusing to cooperate with the government — which are not themselves crimes and therefore cannot be established by an independent criminal prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

OCTOBER 1983

DOJ-1983-10